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No. 149

# In the Supreme Court of the United States

OCTOBER TERM, 1944

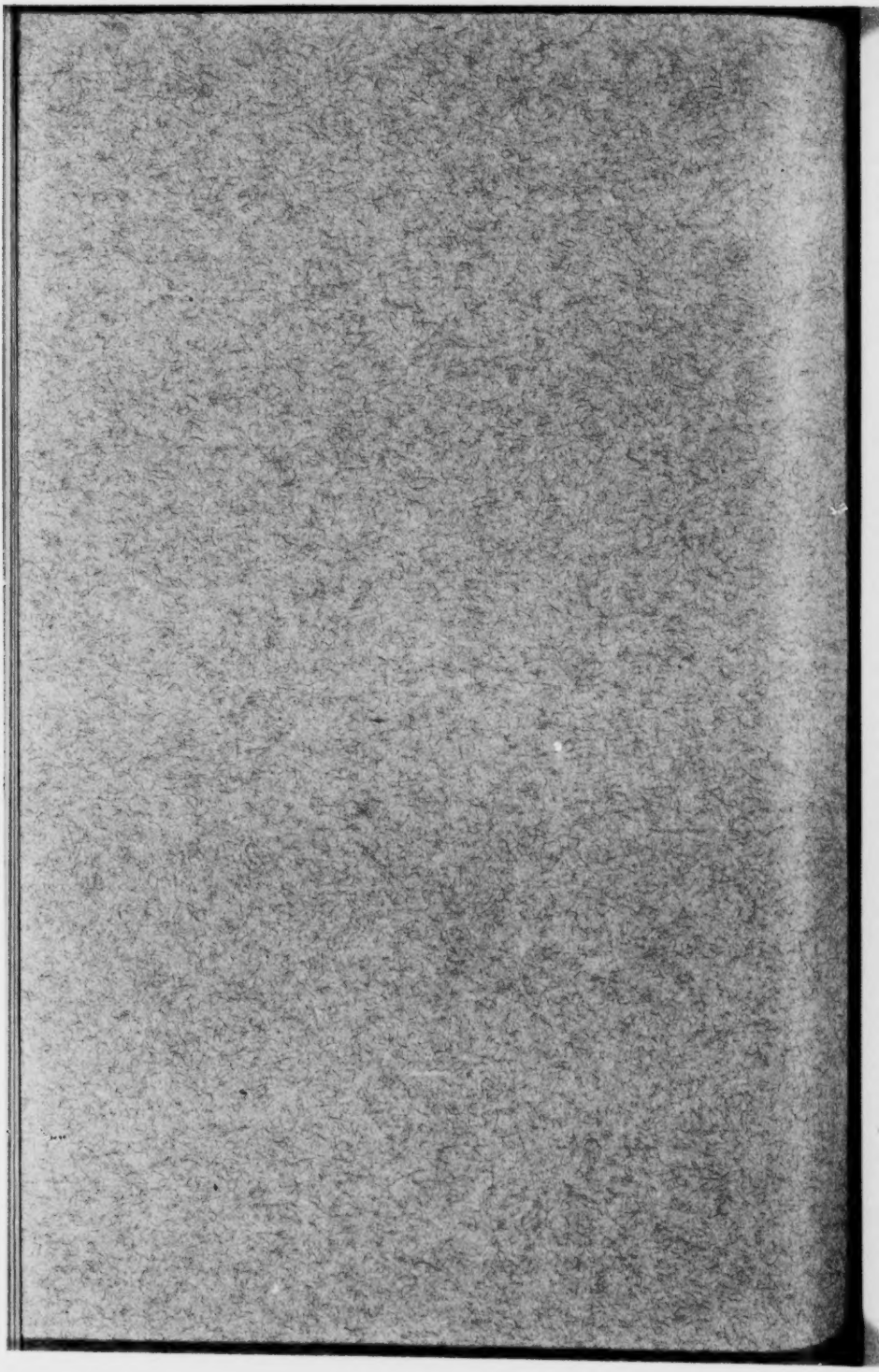
CALDWELL SUGARS, INC., PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION



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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The findings of fact and opinion of the Tax Court of the United States (R. 52–62) are reported at 2 T. C. 105. The opinion of the Circuit Court of Appeals (R. 80–82) is reported at 140 F. 2d 772.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 15, 1944 (R. 82). A petition for rehearing was denied March 13, 1944 (R. 86). A petition for a writ of certiorari was filed June 12, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether, as both courts below found, the taxpayer failed to prove, in the manner required by Section 902 of the Revenue Act of 1936, that it bore the burden of all or any part of the processing tax which it paid and which it sought to recover.

2. Whether it was error not to permit the substitution of a calculation of the taxpayer's "margin" upon the processed commodity during the 1936 crop months for a calculation covering the post-tax period prescribed in the Act.

### STATUTES INVOLVED

The material provisions of the statutes involved are set forth in the appendix to the brief in opposition simultaneously filed in the companion case of *Webre Steib Company, Ltd.* v. *Commissioner of Internal Revenue,* No. 148.

### STATEMENT

This proceeding involves a claim for refund of amounts paid as processing tax under provisions of the Agricultural Adjustment Act which were held unconstitutional in *United States* v. *Butler,* 297 U. S. 1. The taxpayer filed a claim for refund of $29,567.58 (R. 11–22) which was denied in full by the Commissioner of Internal Revenue on September 30, 1941 (R. 9–10). On December 23, 1941, the taxpayer filed a petition with the Proc-

essing Tax Board of Review[1] for review of the Commissioner's disallowance of its claim (R. 4–9).[2] The proceeding was tried on the merits before the Processing Tax Board of Review (R. 2), but had not been decided by that Board before it was abolished and the case transferred to the Tax Court. The case was submitted to the Tax Court on the record made before the Processing Tax Board (R. 3), and on the basis of that record the Tax Court made its findings of fact and held that the taxpayer had failed to prove that it was entitled to a refund of any part of the amount involved (R. 52–62). The Circuit Court of Appeals affirmed (R. 80–82).

Section 902 of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (Brief in No. 148, Appndix, pp. 15–16), provides that the taxpayer may not recover any sum unless he establishes that he has borne the ultimate economic burden of the tax to the extent of the amount awarded and has not shifted it by charging higher prices or paying lower prices for unprocessed material or in any other manner. As a means of determining the incidence of processing

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[1] The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as of the close of business on December 31, 1942, and its jurisdiction and functions were transferred to the Tax Court of the United States.

[2] The Tax Court found that the taxpayer paid taxes in the amount of $28,663.55 (R. 52, 58), but the amount of refund now claimed is only $25,926.43 (R. 59).

taxes sought to be recovered, the Act further provides in Section 907 (Brief in No. 148, Appendix, pp. 16–20) that the extent of the reduction, if any, in the average margin of receipts of the processor over cost of raw materials plus processing taxes, per unit of the commodity processed during the period the taxes were paid, as compared with the average margin of receipts over raw material costs during the 24 months preceding and the 6 months immediately following the period the statute was in effect, shall be "prima-facie evidence" of the extent to which the processor bore the burden of the tax; but "either the claimant or the Commissioner may rebut the presumption" so established "by proof of the actual extent to which the claimant shifted" the burden to others, including, "but * * * not * * * limited to— * * * proof that the difference or lack of difference" between the margin averages was due to other factors and "proof" that the processor modified its contracts of sale "or adopted a new form of contract of sale, to reflect the initiation * * * of the processing tax, or * * * changed the sale price of the article * * * by substantially the amount of the tax * * *, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax * * *; but the claimant may establish that such acts were caused by factors other than the processing tax,

or that they do not represent his practice at other times."

The taxpayer is a Louisiana corporation with its principal place of business in that State. It was engaged at all material times in growing and buying sugarcane and processing it into raw sugar, refined sugar, and blackstrap molasses. It produced about 35 percent of the sugarcane which it processed and purchased about 65 percent from other growers. The taxpayer sold its products through a brokerage firm in New Orleans, except for about one percent of sales, which were made to customers located near the factory. The taxpayer's refined sugar was of an inferior grade and was sold at a differential of 20 cents to 45 cents a hundred pounds below the current price quoted by the American Sugar Refining Company. (R. 53–54.)

From the early spring of 1933 to June, 1934, conditions in the sugar industry were uncertain and confused and the taxpayer was in financial difficulties. The price of raw sugar declined, with a slight interruption in February, from a high of $3.65 per 100 pounds to $2.80 about June 1, 1934, and the price of refined sugar declined from a high of $4.70 to $4.10. (R. 55–56.) The processing tax of 53½ cents per 100 pounds on refined sugar became effective June 8, 1934. The general price level of refined sugar was increased by 55 cents on that date. (R. 57.)

The taxpayer's statutory tax period began June 8, 1934, and ended April 30, 1935. Its average margin per unit of commodity processed during the tax period was $.01186 per pound. Its average margin per unit of commodity processed during the statutory period before and after the tax was $.011538 per pound. (R. 57.) Hence its margin was higher during the period the tax was paid than during the comparative period and a presumption arose that it had not absorbed any part of the tax. The taxpayer did not, however, actually process any sugar during the six months following the period the tax was effective.

The average margin per unit of commondity processed by the taxpayer from its 1936 crop of sugar cane during the months from October, 1936, to January, 1937, inclusive, was $.017961 per pound, computed in the same manner as the margins during the statutory periods (R. 58). This margin was higher than that during the tax period.

The taxpayer paid $28,663.55 as processing taxes. No part of this amount has been refunded. (R. 58.)

The processing tax was not billed as a separate item on the taxpayer's invoices to customers, except on seven invoices upon which $2,737.12 of taxes were billed as a separate charge. There was no agreement expressly relieving the taxpayer of the burden of the tax or reimbursing it therefor. (R. 58.)

The Tax Court concluded (R. 60) that the taxpayer failed to overcome the prima facie effect of the margin evidence and failed to prove that it bore the burden of the processing tax. The Circuit Court of Appeals affirmed (R. 82).

## ARGUMENT

### I

In this case the presumption arising from the margin evidence was reinforced by evidence relating to at least two of the pertinent factors enumerated in Section 907 (e) of the statute (Brief in No. 148, Appendix, pp. 19–20). The general price level of sugar was increased by the amount of the tax as of the date the tax was imposed (R. 57), and it was shown that the taxpayer followed the competitive price level, selling at a small discount (R. 54). On invoices representing 575,700 pounds of sugar processed and sold by the taxpayer during the tax period, the processing tax was admittedly billed as a separate item (R. 58), and the Tax Court was unable to find that these sales were exceptional rather than typical (R. 60).

There is no basis in the findings for any other result in the court below than an affirmance of the Tax Court's decision, unless it be thought that adverse conditions in the sugar industry prior to the effective date of the processing tax (*supra*, p. 5) compelled a contrary conclusion as a matter of law.

Clearly this is not the case. *Colonial Milling Co.* v. *Commissioner,* 132 F. 2d 505 (C. C. A. 6th), certiorari denied, 318 U. S. 780. Indeed, as against the specific facts found, it would have been erroneous for the Tax Court to give effect to allegedly countervailing factors of a general nature. *United States* v. *H. T. Poindexter & Sons Mer. Co.,* 128 F. 2d 992 (C. C. A. 8th), certiorari denied, 317 U. S. 677, rehearing denied, 317 U. S. 710. See also *Williams* v. *United States,* 48 F. Supp. 647 (C. Cls.), certiorari denied, 320 U. S. 750, in which similar contentions were made by the taxpayer. The burden of proof is upon the taxpayer throughout, and it is admittedly onerous. *Colonial Milling Co.* v. *Commissioner, supra; Standard Knitting Mills* v. *Commissioner,* 141 F. 2d 195 (C. C. A. 6th), certiorari denied, May 29, 1944; *Finck Cigar Co.* v. *Commissioner,* 134 F. 2d 261 (C. C. A. 5th), certiorari denied, 320 U. S. 736.

The decision below is not in conflict with *Helvering* v. *Insular Sugar Refining Corp.,* 141 F. 2d 713 (App. D. C.), as asserted by the petitioner (Pet. 7). Although the cases arose in the same industry and the facts relating to conditions in the industry were the same, clearly the specific facts were not identical and the posture of the parties both before the trial tribunal and on appeal was different. In the *Insular Sugar Refining Corp.* case the Government rather than the taxpayer had the burden of overcoming the presump-

tion based upon the margin evidence and the court, which accepted the Board's findings, agreed that the presumption had not been overcome. The instant case is very different. The presumption was adverse to the taxpayer, increasing the burden of proof which rested upon him. The court below simply sustained the conclusion of the Tax Court that it was impossible to say, from the evidence submitted, that the presumption was wrong. To the contrary, the inference was that the *actual* fact coincided with the *presumed* fact.[3]

## II

The taxpayer was properly denied the right to go outside the periods fixed by Congress in computing the comparative margins prescribed by the statute as prima facie evidence. As pointed out in the brief in opposition simultaneously filed in *Webre Steib Company, Ltd.* v. *Commissioner of Internal Revenue,* No. 148, to which reference is here made, the cases of *Epstein* v. *Helvering,* 120 F. 2d 427 (C. C. A. 4th), and *Arkwright Mills* v. *Commissioner,* 127 F. 2d 465 (C. C. A. 4th), furnish no basis for a contrary conclusion, which is not permitted by the statute.

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[3] This case and *Slack Bros., Inc.* v. *Commissioner of Internal Revenue*, No. 150, are to be distinguished from *Webre Steib Company, Ltd.* v. *Commissioner of Internal Revenue*, No. 148, where the presumption was fully overcome by evidence of certain rebuttal factors enumerated in the statute, which established that the *actual* fact was at variance with the *presumed* fact.

## CONCLUSION

There is no conflict of authorities. The decision below is correct. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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